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75-1068

IN THE

Supreme Court of the United States

OCTOBER TERM, 197 No.

LEA ASSOCIATES, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

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CITATIONS

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October Term, 19

No.

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*LEA ASSOCIATES, INC.,**
Petitioner,

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner requests that a writ of certiorari be issued to review the judgment of the United States Court of Claims in this case (No. 433-66) which was entered on October 30, 1975.

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* Elizabeth Kline Jordan (now deceased), originally copetitioner with Lea Associates, Inc. is not included as petitioner because the issue as to her taxes for 1960-1961 has been settled.

OPINION BELOW

The opinion of the Court of Claims (App. A. *infra*, pp. A-1 to A-33) is reported as *Ken M. and Adeline B. Davee* v. *U. S.* in 195 Ct. Cl. 184; 444 F 2d 557 (1971); 1971-1 USTC 9479. The opinion, findings of fact and recommended conclusion of law of the trial judge (unreported) were adopted by the court *per curiam* with certain matter deleted.

On June 27, 1975, the court denied petitioner's motion for rehearing and reconsideration of the court's opinion of June 11, 1971, and for new trial.

JURISDICTION

The judgment of the Court of Claims was entered on October 30, 1975*. The jurisdiction of this court is invoked under 28 U.S.C.S. § 1255-(1).

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* Appendix A 34.

QUESTIONS PRESENTED

1. When a taxpayer pays a lump sum for a mixed group of assets, how should such payment be allocated among the assets acquired in reporting income subject to federal tax?

2. May a trial judge render an opinion on grounds not stated in any pleading or pre trial memorandum?

STATUTES, CONTRACTS AND RULES OF COURT INVOLVED

The pertinent provisions of the statutes, contracts and rules of court involved are set forth in Appendix B, *infra*, pp. ~~B-1 to B-~~ 35a.

STATEMENT

Concretely, the substantive question involved is the proper allocation in reporting income subject to federal tax of the amounts paid by Petitioner, Lea Associates, Inc. (hereinafter "Lea"), to Ken M. Davee (hereafter "Davee") pursuant to an agreement dated May 31, 1962.

Lea and Davee were competitors in the business of providing market research to the pharmaceutical industry. In 1962 each provided a study based on a panel of physicians, which studies were similar, surveying and serving the same market.

The panel known as NDTI was Lea's major activity and Physicians' Panel represented about one-quarter of Davee's activity.

Lea and Davee entered into two contemporaneous agreements which relate to the same transaction. In Sec. 4 of the Sales Agreement dated May 31, 1962, Davee agreed to discontinue Physicians' Panel, to be non-competitive with NDTI for five years, and in Sec. 6 to deliver materials previously generated by Physicians' Panel. By letter dated June 1, 1962 (the Letter Agreement), Davee and his wife, an able assistant to Davee, agreed to perform consulting services and not to compete for five years. Lea agreed to pay Davee $357,500 in installments for his performance under the Sales Agreement and to pay Davee and his wife $30,000 in installments for performance under the letter agreement.

Pursuant to these agreements Davee promptly cancelled all contracts with his clients and with physicians on the panel, put his coordinators on other work and, through his wife and other subordinates, some but not all of the material generated by Physicians' Panel was transferred to Lea over a period of about five months.

Promptly following cancellation of contracts by Davee, Lea solicited the former subscribers to Physicians' Panel to become subscribers to NDTI.

Pursuant to the terms of the two agreements, Lea completed payments to Davee over a period of five years.

The net effect of the transaction from the point of view of the pharmaceutical industry was that Physicians' Panel was discontinued and only NDTI remained for sale.

Lea then deducted the payments made to Davee pursuant to the Sale Agreement dated May 31, 1962, in computing taxable income for the years 1962-1967.

The District Director has disallowed Lea's deduction of the $357,500 paid to Davee stating merely:

> ". . . to treat as a non-deductible capital expenditure that portion of the cost of a business . . ." (Report of Corporation Income Tax Audit Changes dated 9/21/65).

For an understanding of how the foregoing relatively simple state of facts and the clear rule of law governing the same became obscured in the Court of Claims, it is necessary to include in this statement an account of the procedures followed in this case.

On December 30, 1966, Lea filed the petition in the Court of Claims commencing this proceeding (No. 433-66) on an issue unrelated to the matter here in controversy, and on April 18, 1968, Lea amended its petition to include a claim on the same unrelated issue for its taxable year 1962. Such issue has since been settled and stipulation to that effect filed in the Court of Claims October 21, 1975.

On June 5, 1968, Respondent, United States, filed its answer to Lea's amended petition and counterclaimed for $40,690.02 for Lea's taxable year 1962, such counterclaim being for a deficiency computed by disallowance of the payment made by Lea to Davee during 1962.

On July 5, 1966, Davee had filed a petition in the Court of Claims (No. 242-66) raising the converse of the issue in this case, namely, the proper tax accounting for the amounts received from Lea pursuant to the agreement of May 31, 1962.

The *Davee* case was tried at Chicago April 25, 1968. Witnesses called were the chief executive officer for Lea and Davee. Counsel for Lea was present but did not participate in the trial which was conducted by counsel for Davee and counsel for the United States.

At the trial of Lea's case held at Philadelphia August 1, 1968, it was stipulated by counsel that the record and exhibits in the case of *Ken and Adeline B. Davee* vs. *The U. S.* (No. 242-66), but not the pre-trial memorandum therein, might be used as testimony in this proceeding.

At such trial Lea addressed itself directly to the respondent's determination that the payment to Davee was a "non-deductible capital expenditure" for the "cost of a business" and took testimony from two witnesses, one expert in data processing and one expert in taxes and in corporate acquisitions. Their testimony was (1) that Lea acquired nothing of value from Davee other than his discontinuance as a competitor, (2) that there was no purchase of a going business with verification by audit, etc., and (3) that at least on their federal tax return Ken and Adeline Davee did not account for the proceeds from their Physicians' Panel as a separate business. There was no evidence to the contrary at this trial nor at the earlier trial of the *Davee* case (No. 242-66) at Chicago.

The Court of Claims decided that Respondent United States was entitled to recover on its counterclaim against Lea and it is this decision which is here sought to be reviewed, Lea's case in chief, which was the subject of its original petition to the Court of Claims having been settled.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims disallowing Lea's deduction of amounts paid to Davee conflicts with decisions of the Circuit Courts and of the Supreme Court of the United States.

The determination by the Court of Claims against Lea was made on grounds which had not been stated in pleading filed in this case and was based on the testimony of witnesses who were not subject to either examination or cross-examination by Lea.

I. *Law*

The underlying propositions of law governing this matter are four in number, to wit:

1. Under a statute imposing differing rates of tax upon varying transactions, receipts or expenditures must be allocated in accordance with the assets transferred or the services performed. *Aaron F. Williams v. McGowan,* 152 Fed. 2d 570, CCA 2nd, 1945, 1946-1 USTC ¶ 9120; *Watson* v. *Commissioner,* 345 U.S. 544, 73 S. Ct. 848, 1953-1 USTC ¶ 9391; *Rev Rul* 55-79 (1955-1 CB 370).

2. In allocating receipts or payments pursuant to a particular contract, the value of the items transferred, the agreement of the parties, and all of the surrounding circumstances will be considered. *Com.* v. *Danielson,* 378 Fed. 2d 771, 1967-1 USTC ¶ 9423, Cert. Denied SCUS Oct. 9, 1967; *Rev Rul 55-79, supra.*

3. Payments made and received for an agreement not to compete must be reported as expense and ordinary income, and payment made and received for good will is a purchase and sale of a capital asset. *(Covenants Not to Compete; 18th Annual Institute on Federal Taxation 861).*

4. The burden of proof is on the taxpayer and the Trial Commissioner has the duty to weigh the evidence submitted in discharge of that burden. *Missouri Pacific Railroad Company* v. *The United States,* 338 Fed. 2d 668, 1964-2 USTC ¶ 9839, 168 Ct. Cls. 86; *Com.* v. *Danielson, supra.*

II. *Conflict with Circuit Court of Appeals and with* the Supreme Court.

1. Conflict with *Williams v. McGowan* and *Ernest A. Watson,* both *supra.*

The Opinion of the Court of Claims states, "The sale of a going business gives rise to a capital gain or loss since it is the sale of a capital asset" (p. 9).

The foregoing is flatly contrary to the rule of *Williams* v. *McGowan, supra, by* L. Hand J. which has governed this issue since 1946 and with this Court's decision in *Ernest A. Watson* v. *Com., supra.*

The rule of those cases is restated in Rev Rul 55-79 *supra* in part, as follows:

> "For Federal income tax purposes, the sale of a going business operated as a sole proprietorship does not constitute the sale of a single asset. Such a sale constitutes a sale of the individual asset comprising the business. For the purpose of determining whether the gain on the sale of a particular asset is to be included in gross income as an item of ordinary income or whether it is to be treated as gain from the sale of a capital asset, all of the individual assets sold must first be classified as to (1) capital assets as defined in section 117(a) of the Internal Revenue Code of 1939, (2) property used in trade or business as defined in section 117(j) of the Code, and (3) other property not coming within the provisions of section

> 117(a) or section 117(j) of the Code . . . The selling price must be allocated among all the assets sold according to the respective relative values thereof, for example, according to the ratio of the value of each individual asset to the sum total of the values of all the assets sold. Separate computations must be made of the gain or loss with respect to each asset sold, and the gain or loss in each case must be treated in accordance with the classification of such asset, as described above. See *Aaron F. Williams* v. *McGowan,* 152 Fed (2) 570; *Ernest A. Watson* v. *Commissioner,* 345 U.S. 544, Ct. D. 1760, C. B. 1953-1, 179."

Because of this fundamental misconception of the law, that the assets purchased from Davee were necessarily capital assets (other than the $30,000 paid pursuant to the Letter Agreement), the real issue in this case remains undetermined, namely, what did Lea get by paying Davee $357,500? Lea alone in this proceeding has provided any evidence as to how the $357,500 should be allocated to the assets acquired. There is no evidence to the contrary.

2. Conflict with *Com.* v. *Danielson, supra.*

The opinion below adopts Respondent's position that "the Court should not then go behind the agreement at the insistence of either party unless there is shown fraud, duress, or undue influence such as would be necessary to alter the terms of the contract itself. *Commissioner* v. *Danielson,* 378 F 2d 771 (C.A. 3d, 1967)." (p. 10)

The foregoing is a mixed error of law and fact. As to the error of fact, Lea has not challenged the Sale Contract pursuant to which it paid $357,500 to Davee. Lea affirms that contract and has submitted the only evidence in this proceeding as to what it acquired for that payment and as to how that payment should be allocated.

The Commissioner of Internal Revenue challenged Lea's interpretation of the contract by his determination that payments pursuant thereto should be treated as "non deductible capital expenditure."

A correct statement of the law would be as follows:

> When the allocation of amounts paid or received for a group of assets is challenged by the Commissioner of Internal Revenue, then the Court has the duty to determine the correct allocation under all the facts and circumstances.

The Respondent has adopted the inconsistent position of challenging Lea's interpretation of the contract, offering no evidence in support of his position and then citing an erroneous proposition of law that the Court may not examine the evidence.

The opinion below misapplies the rule of the *Danielson* case, *supra,* wherein the Third Circuit Court held:

> "Where the Commissioner attacks the formal agreement the Court involved is required to examine the 'substance' and not merely the 'form' of the transaction . . ."

The rule of law is clear that the Commissioner of Internal Revenue, having challenged allocation by the taxpayer, the trier of fact must weigh all the evidence, including any allocation by agreement in determining the issue and this is the rule in the Tax Court and in every Circuit wherein this question has been considered.

III. *Departure from accepted judicial proceedings.*

The sole statement by Respondent with respect to its counterclaim against Lea is found in a revenue agent's report, to wit:

> ". . . to treat as non-deductible capital expenditure that portion of the cost of a business . . ." (Report of Corporation Income Tax Audit Changes dated 9/21/65.)

Faced with a determination that its payments to Davee were capital in nature, Lea went to trial prepared to face that issue and introduced testimony of two experts as to the value of what was acquired from Davee. There was no testimony to the contrary. It was stipulated by counsel that the testimony taken at the trial of the Davee case (but not the pre trial memorandum) could be used as testimony in the trial of Lea's case.

The court below then based its determination against Lea on a finding that Lea had entered into a binding contract with Davee making allocation of the payments between them. The fact that this finding is contrary to the testimony in the Davee case is here beside the point which is that a determination against Lea was made on grounds never adumbrated by any pleading or pre trial memorandum and based on testimony of witnesses which Lea was never allowed either to examine or to cross examine.

It is well established by the trial courts in matters involving federal income tax that the burden on the taxpayer is limited to the issues present at the time of the trial. Citation of one case should suffice for this self-evident proposition.

> "A second proposition, the failure of the taxpayer to show the amount of the loss, was raised and argued by the government for the first time in its post-trial brief. The burden of the taxpayer, as cited under this proposition, is, however, limited to the issues present at the time of trial. We find no obligation to answer arguments subsequently raised, and to adopt this

> course would, in our judgment, render pleadings useless and impose an intolerable burden upon the plaintiff. The taxpayer did put in evidence the value of the machinery at the time it was scrapped and that was the only evidence introduced upon the subject. At this question was not hitherto raised and the taxpayer had otherwise sustained her burden, we are not at this late date required, nor do we feel inclined, to examine the matter further." *(Thomas A. Walsh, Jr.* v. *U.S. Dist.* Court Neb. 163 F. Supp 421, 425, 1958-2 USTC ¶ 9713.)

In this case Lea directed its testimony to the issue raised by the Respondent and showed the value of the assets acquired and the proper allocation thereto of the purchase price. Respondent and the court below have responded with a determination that Lea had entered into a binding contract allocating purchase price, a proposition of which Lea was given no warning by the pleadings. The Court of Claims should have, as did the District Court of Nebraska, refused to consider an argument which was raised for the first time on brief.

The trial judge departed from accepted judicial proceedings by his failure to employ any of the pre-trial procedures as outlined in Rules 111-113 of the Court of Claims (Appendix B)(46a).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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January 26, 1976

75-1068

IN THE

Supreme Court of the United States

OCTOBER TERM, 197 No.

LEA ASSOCIATES, INC.,
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APPENDIX

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Appendix A

In the United States Court of Claims

(Decided June 11, 1971)

No. 242–66

KEN M. DAVEE AND ADELINE B. DAVEE v. THE UNITED STATES

No. 433–66

ELIZABETH KLINE JORDAN AND LEA ASSOCIATES, INC. v. THE UNITED STATES

Morris J. Coff, attorney of record, for plaintiffs in No. 242–66. *David D. Rosenstein, Fink, Coff and Nudelman*, of counsel.

Andrew B. Young, for plaintiffs in No. 433–66. *Robert C. Lea, Jr.*, attorney of record. *Hart, Childs, Hepburn, Ross & Putnam*, of counsel.

W. Stephen McConnell, with whom was *Assistant Attorney General Johnnie M. Walters*, for defendant. *Philip R. Miller*, of counsel.

Before Cowen, *Chief Judge*, Laramore, Durfee, Davis, Collins, Skelton, and Nichols, *Judges*.

OPINION

Per Curiam: This case was referred to Trial Commissioner C. Murray Bernhardt with directions to make findings of fact and recommendations for conclusions of law under the order of reference and Rule 134(h). The commissioner has done so in an opinion and report filed on July 28, 1970. Ex-

ceptions to the commissioner's opinion, findings of fact and recommended conclusions of law were filed by plaintiffs in No. 433–66 and defendant and the case has been submitted to the court on oral argument of counsel and the briefs of the parties.

Since the court agrees with the commissioner's opinion, findings of fact and recommended conclusion of law, with the deletion of matter in the opinion no longer pertinent to the case, it hereby adopts the same, as modified, as the basis for its judgment in this case as hereinafter set forth. Therefore, plaintiffs in No. 242–66 are entitled to recover and judgment is entered for them with the amount of recovery to be determined pursuant to Rule 131(c). Defendant is entitled to recover on its counterclaim in No. 433–66, however, the entry of judgment thereon is deferred pending determination of plaintiffs' case in chief in that litigation.

Commissioner Bernhardt's opinion, with the deletion of matter no longer pertinent, is as follows:

The common primary issue in these two companion petitions concerns the tax treatment to be accorded the consideration in the sale of a going business by plaintiff Davee (hereafter denoting husband and wife coplaintiffs) in the one petition to plaintiff Lea in the other petition,[1] particularly wherein a portion was specifically allocated by agreement of the parties to a covenant not to compete. The stakeholding Government, which originally opposed the taxpayers' conflicting contentions on mutually inconsistent grounds, now opts for the Davee view that the sale of all but the covenant not to compete was a capital transaction and taxable as such, and opposes Lea's position that the entire sale resulted in ordinary income to Davee and amortizable deductions to Lea because (per Lea) the dominant if not sole asset bought by Lea and sold by Davee was the latter's covenant. A secondary issue affecting only the Davee petition is the tax treatment for payments he made to a French concern for assembling data to launch a new market research business serving the French market.

[1] Elizabeth Kline Jordan and Lea Associates, Inc., are coplaintiffs in Petition No. 433–66. Jordan is a stockholder of her coplaintiff corporation. Plaintiffs in No. 433–66 will be referred to as "Lea" for convenience.

I—*Covenant Not To Compete Issue*

Essentially we have two concerns (Lea and Davee) which, in 1962, were sole competitors in providing a particular market research service to large American pharmaceutical and ethical drug manufacturers in the form of periodical publications which, based upon continuous surveys compiled from nationwide panels of representative physicians reported to their respective customers the fluctuating professional response to, and the use and effectiveness of various drugs, presumably as a basis for determining trends which would dictate future research, manufacturing and sales efforts. While each of the competing services duplicated the other's principal purpose, gathered its statistical data in comparable ways through an elaborate and expensive network of assistants in the healing profession such as doctors and interns, and computerized the myriad data thus obtained in coded form for customer consumption, each service had its own stable of customers and varied somewhat as to contents, format, and title. Thus Lea's publication was known as "National Drug and Therapeutic Index" (NDTI) and Davee's was "Physicians' Panel".

By 1962 it became apparent that the number of potential customers in the drug and pharmaceutical industry was not sufficient to support comfortably both NDTI and Physicians' Panel. Of the limited number of customers for this expensive service ($28,000 per year) Davee then had 18 and Lea, which had fewer, was gradually nibbling away at Davee's roster of customers. Physicians' Panel was only one of several profitable marketing services in generically related fields owned and conducted by Davee.

In 1962 Lea made overtures to purchase Davee's Physicians' Panel. The record of these negotiations over a period of several months, as reported in annexed findings 15 through 22, contains offers by Lea, counteroffers by Davee, and a series of amendments, deletions, additions, etc., culminating in two companion documents—a sale agreement of May 31, 1962 and a letter agreement of June 1, 1962. Throughout negotiations the parties had consulted with their respective tax counsel as to the tax ramifications of the transaction, and it cannot be said that either was unaware of what he

was doing. Nor is there a hint of fraud, duress or mistake, or even misunderstanding, in the final arrangements they perfected or in the negotiations preceding them. These were sophisticated and informed businessmen who fully understood the legal effect of their undertaking, particularly as to resulting taxes, and without doubt the agreement was reached on the basis of prospective profits and earnings after taxes.

The sale agreement described Davee's Physicians' Panel (section 1), referred to Lea's wish to expand the NDTI service by "purchasing" Physicians' Panel (section 2), mentioned Davee's agreement to "sell" and Lea's agreement to "buy" Physicians' Panel (section 3), permitted Davee to continue to operate his other marketing research services but prohibited him for five years from soliciting or obtaining any data from physicians in the United States with specific exceptions not here germane (section 4), stipulated a purchase price of $320,000 payable in cash and installments over five years (section 5), prohibited Davee from collecting any further data for Physicians' Panel and required him to furnish Lea his past reports, casebooks, and other material concerning operation of Physicians' Panel within prescribed times so that Lea could "utilize these data and materials in the operation of its NDTI service and the business sold hereunder" (section 6), provided a $37,500 bonus to Davee for consummating the deal by July 6 or $18,750 by October 5, 1962 (section 7), provided forfeiture to Davee of both the Physicians' Panel and NDTI on Lea's default of the purchase notes (section 8) and, reciprocally, a cancellation of the notes and a return to Lea of all amounts paid Davee thereunder upon default by Davee of his obligations under the contract (section 9), assumption by Lea of Davee's obligations (nil) to his Physicians' Panel subscribers (section 11), and a commission to Davee if Physicians' Panel subscribers switched to NDTI prior to the consummation date (section 12). Repeated references in the sale agreement to the fact of purchase and sale leave no room for doubt that, at least in form, the parties contemplated the sale of a going business. It is worthy of note that the *sale* agreement did not allocate any portion of the purchase price to a covenant not to compete, nor contain any allo-

cation to the covenant of Davee in section 4 not to solicit or obtain reports or data from physicians in the United States, nor did it mention goodwill by name.

The letter agreement of June 1, 1962, which was executed contemporaneously with the sale agreement, provided for the payment of compensation of $6,000 per year for five years for the consulting services of Davee and his wife. It also contained a payment in the event of death provision, and the following covenant not to compete which is at the heart of this litigation:

> It is also understood that during the five years following the consummation date, neither of you [*i.e.*, neither Davee nor his wife] will engage directly or indirectly as owner, manager, operator or associate or in any other capacity in the operation or control of any panel based on data obtained from physicians within the United States of America, nor will anyone employed by you engage in the operation or control of such a panel in the course of such employment. * * *

There is no particular significance to be derived from the fact of two separate but contemporaneous instruments, a sale agreement and a letter agreement. Whatever result they achieved by the separation could have been equally accomplished by a merger of the two documents into one. Merged or not, the separate allocation in the letter agreement to a covenant not to compete could be deemed to subsume the non-competition language in section 4 of the sale agreement. Further, the record reflects that, despite the literal wording, the $30,000 consideration for the letter agreement was almost exclusively for the covenant not to compete expressed therein. The consulting services proffered by Davee and his wife, and the payment-in-the-event-of-death provision, were only of fringe significance and value, and why they were included in the letter agreement along with the covenant is not quite clear.

The covenant not to compete underwent several metamorphoses in the course of negotiations before assuming its final form. In the initial draft of an agreement prepared by Lea a five-years' covenant not to compete was included, to which Lea proposed allocating three-sevenths of the contract price. Lea did not want to include goodwill in the description of assets proposed to be transferred because goodwill could not

be depreciated for tax purposes. Davee rejected the proposed allocation to the covenant and could not think of a basis for allocating a portion of the contract price for that purpose; moreover, he had been advised by counsel that such a covenant would be illegal. Davee submitted a revised draft to Lea which contained a covenant not to compete, but no price allocation was given to it. Lea countered with a draft which included a three-years' covenant not to compete without allocation of purchase price, and expressed concern that the tax authorities would assign a value to the covenant if the parties did not do so themselves. Davee then responded with a revised draft of the sale agreement omitting the three-years' covenant not to compete but incorporating it in a separate letter agreement along with a provision for the part-time consulting services of himself and his wife for three years. The parties never contemplated that Davee and wife would actually render any substantial services as consultants to Lea, and the services rendered later were minimal. The letter agreement proposed a payment of \$30,000 by Lea for the promises it included, and the \$350,000 sale agreement consideration was correspondingly reduced to \$320,000. The parties then entered into the sale agreement and letter agreement previously described, which followed the final drafts except for increasing the three-years' covenant not to compete and the consulting services provision to five years instead of three, and altered the installment payments for the letter agreement to \$6,000 per year for five years. The parties fully understood and intended that the \$30,000 consideration for the covenant was to be treated as ordinary income to Davee and a deductible expense to Lea.

Thereafter Davee earned the \$37,500 bonus for early consummation offered by Lea by canceling the subscriptions to Physicians' Panel promptly and turning over to Lea the office records and data. The chief value of the data to Lea was in effectively discouraging Davee from reentering the field by depriving him of his data. Lea unilaterally assigned a subjective value of \$75,000 to the data several months following the sale, and had little practical use of it other than as stated. Lea did not use any individuals on Davee's list of interns and physicians who had contributed to the information in Physicians' Panel. No customer contracts, nor the names of Physicans' Panel and Davee, were transferred with the sale. Lea's principal purpose in the purchase was the expectancy that, with Davee eliminated, the customers of Physicians' Panel would become NDTI customers. On the other hand, Davee considered that he had sold a going business. Davee's books were not audited by Lea to ascertain net income figures, no receivables were transferred, and assumed liabilities were nonexistent.

Income tax returns filed by Davee for 1962 and 1963 reported payments received from Lea under the sale agreement as capital gains on an installment basis, and those received under the letter agreement as ordinary income. The District Director of Internal Revenue assessed deficiencies on the ground that all of the amounts received from the sale of Physicians' Panel were ordinary income. Davee paid the deficiencies and more than six months have elapsed from the date of his refund claims, without a decision having been rendered. The deficiencies paid and the refund claims therefor include amounts for both the primary issue and a secondary issue to be discussed, *infra.*

Having deducted for tax purposes the payments made to Davee in 1962 under the sale and letter agreements, Lea consented to deficiency assessments made by the Internal Revenue Service which were based on the contention that the payments made as described were improperly deducted since the purchase of Davee's business was a capital transaction. In response to Lea's suit herein for refund of assessments which had been made and paid for an unrelated earlier transaction, the defendant filed a counterclaim for the unpaid assessments arising from the Davee purchase. The initial ambivalence of the Government in its opposition to both the Lea and Davee contentions is apparent, and rested on the standard burden of proof obligation which taxpayers bear in refund suits, but it was cured ultimately by the Government's announced preference for the Davee contentions.

To put the legal problem in perspective: The sale of a going business gives rise to capital gain or loss since it is the sale of a capital asset. When a properly qualified covenant not to compete for a specified period is entered into as part

of the sale of a going business under particular conditions, the portion of the consideration attributable to the covenant is normally taxable as ordinary income to the seller, and the purchaser may deduct the cost over the period of the covenant's ascertainable life. This is so because the consideration is for services, albeit in the negative form of forbearance from future competitive conduct. A sale entailing goodwill results in capital gain to the seller, but the buyer may not depreciate the goodwill because it is an intangible asset whose useful life is not susceptible of determination. All excess of the sale price over the value of the tangible assets transferred should be assigned to the covenant not to compete and other intangibles, the latter habitually being goodwill or its equivalent. It is conceivable, but rare, that a "naked" covenant not to compete (*i.e.*, one unaccompanied by the sale of the assets of the related business) can be given in the total absence of goodwill.

The rule of law deemed to govern the facts of this case is as follows: If the parties to the sale of a going business comprising tangible and intangible assets, including goodwill, or its equivalent. bargain in good faith at arms' length, and without mistake, fraud, or duress, over the allocation of a specific part of the purchase price to the seller's covenant not to compete,[2] and both the covenant and the value allocated to it possess economic reality independent of tax advantage as prime motivation in that the seller surrenders a right which he is capable of exercising for a price which is realistic and reasonable in the circumstances of the particular transaction, then the value so allocated to the covenant is taxable as ordinary income to the seller and is deductible by the buyer, even though the purpose of the covenant is to effectuate and protect the passage of pseudo goodwill of which it is an ancillary and inseparable component. The balance of the sale is then treated as a capital transaction. This is

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[2] There have been times when the court has disregarded the good faith agreement of the parties with respect to allocation of part of the purchase price of a business between goodwill and a covenant not to compete, and has substituted an allocation of its own (*Levine* v. *C.I.R.*, 324 F. 2d 298 (3rd Cir. 1963), *aff'g* 31 P–H Tax Ct. Mem. 410 (1962)), and other times when in the absence of a separate allocation by the parties the court has supplied one (*Horton* v. *C.I.R.*, 13 T.C. 143 (1949), appeal dismissed on Commr.'s motion, 180 F. 2d 354 (10th Cir. 1950)), and *Melvin C. Miller*, 33 P–H Tax Ct. Mem. 2079 (1964).

the conclusion compelled by the weight of the case law and necessary to provide the taxpaying business community with a stable and predictable basis for the tax consequences of their contemplated transactions. In passing it is only fair to comment that while the solution is practical it is syllogistically imperfect in that it accepts the severability of goodwill from a covenant not to compete solely because of the manner in which the latter is arrived at and the form in which it is couched, whereas except in the case of the sale of a naked covenant, it is difficult to conjure an effective transfer of goodwill which permits the seller to frustrate it by continuing to compete for the trade of his former customers.[3] In fact, the sale of goodwill carries with it by implication alone the seller's refrainment from competition since his competition after the sale may constitute a breach of the agreement to transfer goodwill. In contract law such a covenant is enforceable only if given to protect the conveyance of goodwill.[4]

No rules of unerring application derive from the considerable body of litigation concerning the taxation of the consideration given and received for covenants not to compete in connection with the transfer of goodwill incident to the sale of a business. Legal thought divides into three general approaches employing the doctrines of severability,[5] substance over form,[6] and form over substance,[7] each of which schools has its supporting judicial precedents and scholarly

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[3] Mertens, *Law of Federal Income Taxation*, postulates in § 22.33 at p. 219 the inherent difficulty of envisaging a covenant not to compete which is severable from the goodwill which it is essentially designed to protect. *And see Schulz* v. *C.I.R.*, 294 F. 2d 52 (9th Cir. 1961), *aff'g* 34 T.C. 235 (1960), which regarded such covenant as necessarily a contribution to goodwill. *But Wilson Athletic Goods Mfg. Co.* v. *C.I.R.*, 23 P–H Tax Ct. Mem. 845 (1954), *rev'd* and *rem'd*, 222 F. 2d 355 (7th Cir. 1955), comes close to being an example of a case where a covenant not to compete was not tied into goodwill since the purchaser had no visible use for the seller's goodwill in the form of the seller's name, customers, etc. In the case under consideration Lea had little or no use for Davee's goodwill as such in the conventional sense.

[4] Madison, *Tax Treatment of Covenants Not To Compete*, 24 U. Miami L. Rev. 1 (Fall 1969), n.4, at pp. 18, 19.

[5] *Ullman* v. *C.I.R.*, 29 T.C. 129 (1957), *aff'd*, 264 F. 2d 305 (2d Cir. 1959). *But see Toledo Newspaper Co.*, 2 T.C. 794 (1943) and *Toledo Blade Co.* v. *C.I.R.*, 11 T.C. 1079 (1948), *aff'd* 180 F. 2d 357 (6th Cir. 1950), *cert. denied*, 340 U.S. 811 (1950).

[6] *Wilson Athletic Goods Mfg. Co.* v. *C.I.R.*, n. 3, *supra*. *Annabelle Candy Co.* v. *C.I.R.*, 314 F. 2d 1 (9th Cir. 1962).

[7] *Danielson* v. *C.I.R.*, 44 T.C. 549 (1965), *vacated* and *rem'd*, 378 F. 2d 771 (3d Cir. 1967), *cert. denied*, 389 U.S. 858 (1967).

adherents and dissidents.[8] The facts of the given case governing the result do not necessarily conform to the models representing each school, and offer a basis for frequent departure. The intentions of the parties as evidenced in their agreements, the form in which those intentions are expressed, the legitimate desire of taxpayers for a coherent and foreseeable tax consequence, the Government's insatiable thirst for revenue, the antithetical interests of buyer and seller, and the economic realities of each transaction combine to shape what is in the final analysis a subjective expression of the sitting court's predilection and philosophy.

The legal conclusion announced as being applicable to the instant situation rests upon considerations peculiar to its set of facts. Each of the parties was, or should have been, fully cognizant of the probable tax results of their deal, and are therefore presumed to have intended them. Each party was a free agent, neither mistaken nor coerced. Section 9 of the sale agreement conditioned payment of Lea's installment purchase notes on Davee's refraining from soliciting or obtaining data from physicians in violation of section 6.[9] The antithetical positions of the parties as buyer and seller tend to produce a roughly countervailing effect on tax revenues, in that the loss in tax revenue from the seller is approximately met by the gain in revenue from the buyer. At least the Government has not said otherwise, but instead has adopted in its brief the following *laissez-faire* position favorable to Davee:

> The Government takes the view that where the parties to a transaction involving the sale of a business have entered into a separate written agreement spelling out the precise amount to be paid for a covenant not to compete, the Court should not then go behind the agreement at the insistence of either party unless there is shown fraud, duress, or undue influence such as would be necessary to alter the terms of the contract itself. *Commissioner* v. *Danielson*, 378 F. 2d 771 (C.A. 3d, 1967). This is the rule we urge in these cases.

The agreement of the parties on the covenant not to compete had economic reality, in that Davee, the covenantor,

[8] MADISON, *supra*, n. 4.

[9] *Cf. Carboloy Co.*, 2 T.C. 1267 (1943).

surrendered a valuable right to compete, when he was fully capable of competing for the indefinite future. The court is in a less favorable position than the parties to judge the economic reality of the value assigned by them to the covenant. Undoubtedly, the amount was agreed upon by the parties with the tax impact in mind. Where they do so it is rarely the province of the court to revise their agreement in the absence of a shocking disproportion or manifest injustice to the public treasury, in which case the Government would be expected to remark it.[10]

Lea's position urging that the entire purchase price should be allocated to the covenant not to compete is extreme. It is based upon the fact that Lea genuinely had little or no use for Davee's services or his back records, except to deprive Davee of the latter as a further impediment to his competitive reentry, on top of other sanctions imposed by the agreements. Lea's argument to this end not only repudiates the terms of the written agreements and the record of negotiations leading thereto,[11] but also would expose the transaction to a speculative risk of restraint-of-trade invalidity from the viewpoint of public policy. If so, Lea's right to claim tax deductions by virtue of an agreement which is in violation of public policy would be in possible jeopardy.[12]

Furthermore, Lea's position if adopted would in effect amount to a rewriting of the contract between the parties so that it would produce a net financial result contrary to their clear intentions. It would, for example, be unrealistic to expect that Davee would have been interested in selling to Lea for a net-after-tax figure of approximately $100,000 a going—though dwindling—business which netted him about $90,000 per year, yet this would be the estimated consequence to Davee were Lea's argument to prevail. It is natural to assume that the sale appealed to Davee because his income from other sources reduced his net-after-tax income from Physicians' Panel to a figure not sufficiently

[10] *Levine* v. *C.I.R.*, *supra*, n. 2.

[11] There is authority that such unilateral repudiation in order to obtain favorable tax treatment may constitute a breach of contract. *Stern & Co.* v. *State Loan & Fin. Corp.*, 205 F. Supp. 702, 705–6 (D. Del. 1962).

[12] *Cf. Hardin Mort. Loan Co.* v. *C.I.R.*, 137 F. 2d 282 (10th Cir. 1543).

attractive to justify its continuation in comparison to his retained after-tax capital gain resulting from the sale. On the other hand, it is equally obvious that the prospective revenues from Davee's former customers for the Physicians' Panel service which Lea hoped to acquire for NDTI involved little more expense for Lea than Lea's expenses of servicing its existing customers for NDTI. While it would be to Lea's financial advantage to be permitted to deduct from gross income all payments made for the purchase of Physicians' Panel, precluding that annual privilege could eventually result in beneficial long-term capital gain treatment to Lea by increasing the cost basis of an NDTI business swollen by the acquisition of Physicians' Panel customers.

Other than the covenant not to compete, the nature of the intangible asset sold by Davee to Lea defies precise characterization. For transparent reasons Lea considers the entire consideration for the purchase price to have been the covenant. Davee terms the non-covenant intangible thus transferred to be something in the nature of goodwill. The Government more aptly styles it "market access" and points out that, to the extent Lea was able to acquire Davee's former customers, Davee's covenant not to compete for five years conferred for practical purposes "market access" or "goodwill" of a more or less permanent nature, or so long as Lea provided services desired by NDTI customers. This is on the theory that a five-year absence by Davee would effectively deter his resumption of competition with NDTI, particularly in view of his deprivation of prior records. The fact that in the precontract negotiations Lea refused to purchase goodwill, and that no reference to goodwill is made in the agreements themselves, merely reflects Lea's awareness that goodwill is not a depreciable asset, rather than establishing the intangible sold to be something other than a species of goodwill in substance. In contending that the sale constituted in substance a sale of Davee's covenant not to compete, Lea relies heavily on section 4 of the sale agreement which prohibited Davee for five years from soliciting or obtaining any data from physicians in the United States. Contrasting this provision with the related covenant contained in the letter agreement discloses the inadequacy of section 4 of the sale

agreement as a fully restrictive covenant by Davee not to compete. For example, strictly interpreted as such covenants must be, it would not have prevented Davee from obtaining and using such data indirectly through the medium of an agent or his wife. Lea also argues that the deliberate non-transfer of the names of Davee and Physicians' Panel in connection with the sale indicates that no goodwill was involved in the sale. The explanation is that Lea had no use for the title of Physicians' Panel nor for Davee's name and services, although the services of Davee and his wife were nominally included in the letter agreement without any intention on the part of Lea to use them in any substantial degree. Davee's blessing in the form of his disappearance rather than his active help was Lea's sole object.

In this case the court can justifiably disregard the personal motives of Lea in purchasing Davee's business since, even if true, to the extent Lea's motives differ from the contract terms of what was done the latter will control. Thus, if Lea's prime purpose in the transaction was to eliminate Davee's competition, in purchasing Davee's business rather than solely a covenant not to compete Lea exercised a choice of forms which involved the purchase of something over and above Davee's naked covenant. Whatever that something was, particularly as to intangibles, clearly meant to Davee the surrender of his business, with the covenant as a separate but ancillary benefit conferred on the purchaser. Even if Lea's contention is correct that the substance of the entire sale was of a covenant not to compete to the virtual exclusion of anything else of value and contemplated use, in weighing the respective merits of preserving the legal theory or recognizing the equitable consequences of not doing so, the practical aspects of the latter will dictate the decision.

II—"*Pharmacies-France*" *Issue*

In 1962 Davee commenced a new marketing research business consisting of the periodic publication of a report entitled "Pharmacies-France" containing detailed statistical information on the ethical drugs sold in France. The report was based upon data furnished by a cooperating group of

French drugstore owners and operators. In 1962 Davee paid a French management consulting firm \$12,257.50 for its services in obtaining sources of data for "Pharmacies-France", and in 1963 \$2,353.55 was paid to the same firm for similar services. Not only for the French Panel, but for all reports published by Davee, it was always necessary to recruit people who would cooperate in furnishing data. Constantly, certain sources of data were no longer willing or able to supply data, and these sources had to be replaced by others.

The particular services for which Davee paid the French firm were for enlisting the cooperation of some 400 French pharmacies, securing replacements as needed, reimbursement for payments to the cooperating sources, and monthly visits to microfilm records.

On their Federal income tax returns for 1962 and 1963, the plaintiffs deducted these amounts paid to the French firm as ordinary and necessary business expenses. The District Director of Internal Revenue, adopting a Revenue Agent's report for the years in question, determined that such amounts were—

> * * * [Expenditures] * * * associated with the start-up of Marketing Research for the collection of data in France.
>
> This expenditure incurred by the taxpayer represents a capital expenditure that is not subject to depreciation due to its indefinite life.

Accordingly, the deductions were disallowed. Deficiencies were assessed and paid. Refund claims timely filed by plaintiff have not been decided despite the passage of more than six months, and timely suit was instituted as a count in the instant petition.

Davee contends that the costs in issue were deductible in full as ordinary and necessary business expenses within the meaning of section 162 of the Internal Revenue Code of 1954, as recurring expenses, while the Government contends that the expenses were in connection with permanent improvements and benefits made to increase the value of the property, whose deduction is forbidden by section 263(a)(1) of the 1954 Code.

The Government's contention is based largely upon the disproportion between the 1962 expenses (\$12,257.50) and those for 1963 (\$2,353.55), inferring a lack of the recurrency required to support Davee's position. The disproportion suggests that only an allocable portion of such expenses were recurrent in fact, namely, those attributable to replacement, payment, and regular servicing of drugstore contributors, as opposed to the initial enlistment of a roster of such trade contracts. The burden of proving the allocation is, of course, on the taxpayer.

To extricate himself from the effect of section 263(a)(1), *supra*, Davee cites section 173 of the Code which exempts from section 263 all expenditures to "establish, maintain, or increase the circulation of a newspaper, magazine, or other periodical", with exceptions not here relevant. Assuming Davee's French service to be a periodical, section 173 is specifically addressed to *circulation* expenses and not to the expense of establishing the periodical itself. The contributing drugstores constituting the source nucleus of the French service cannot be remotely equated to the subscribers to a publication. Subscribers are customers of a publication. Davee's potential "subscribers" were French pharmaceutical concerns, not the contributing drugstores.

Analogically there is the same approximate relationship between a news reporting staff and its newspaper employer on the one hand and Davee's drugstore network and his publication on the other. In each case the publication obtains its raw data from these sources, and without such data the newspaper could no more obtain subscribers than could Davee's service obtain customers. Thus, there is in each instance a remote relationship of the data-gathering function to the "circulation" structure of each publication, but the circulation expenses contemplated by section 173 of the Code demand something more proximately related to circulation, such as expenses of advertising, solicitation, distribution and the like aimed at establishing, maintaining, or increasing the circulation.

The theory of capital expenditures is described by MERTENS, *Law of Federal Income Taxation*, at § 25.20, pp. 96–98, as follows:

> Section 162 of the 1954 Code is intended primarily, although not necessarily, to cover expenditures of a re-

curring nature where the benefit derived from the payment is realized and exhausted within the taxable year. Accordingly, if as the result of the expenditure the taxpayer acquires an asset which has an economically useful life beyond the taxable year, or if it secures a like advantage to the taxpayer which has a life of more than one year, no deduction of such payment is allowable as a business expense. In such event, to the extent that a deduction is allowable, it must be obtained under the provisions of the Code which permit deductions for amortization, depreciation, depletion, or loss. * * *.

And at p. 102 of § 25.20 MERTENS continues:

Occasionally, an expenditure may represent in part a business expense and in part a non-business expense, which latter might or might not be a capital expenditure. In such cases it is necessary to make an allocation so as to determine the amount deductible under this provision of the statute. The burden of proving the proper allocation of the total payment is on the taxpayer.

[Footnotes omitted.]

The issue in each case is necessarily a factual one. It is reasonable to conclude in this case that the expenditures made by Davee in 1962 were largely non-recurrent and, therefore, non-deductible, and those made in 1963 were recurrent and deductible. While the plaintiff has the burden of proving the proper allocation, it is permissible to satisfy that burden by producing facts from which logical inferences can be drawn where by the nature of the issue literal proof would be inordinately difficult and out of proportion to the aim. Thus, in this instance, it is inferred that the 1962 expenditures were starting-up expenses associated with the establishment of a new venture in a limited marketing service field, and that the results of the expenditure that first year were primarily to establish a fluctuatingly permanent data basis for a publication good not only for that year but, with additions and deletions, for subsequent years. It is assumed that the major part of the 1962 expense represented the enlistment of the drugstore panel. This is corroborated by the vastly greater expense in 1962 than in 1963, and the excess is properly attributable in great part to the enlistment of cooperating drugstores. To the extent that a portion

of such total expense in 1962 was for securing replacements as needed, or for reimbursement of expenses paid to the cooperating sources, or for monthly visits to microfilm records—all of which type of expenses would be, if proven, currently deductible as ordinary and necessary—the plaintiff has not undertaken an allocation and the court is not in a position to do so without rank guessing.

For consistent reasons all of the expense deducted in 1963 is considered to be ordinary and necessary in character, and therefore deductible, consisting as it undoubtedly did in largest part in rendering required services other than occasional recruitment of replacement drugstores.

The importance of this resolution of the issue to Davee is that if the expenses in question are not deductible as ordinary and necessary business expenses, they would not qualify for amortization deductions otherwise because the benefits they confer on the business lack a reasonably ascertainable useful life for spreading purposes. Thus, Davee would be permanently deprived of the benefit of using such costs in his annual tax equation, and would be left only with an increased cost basis when and if he eventually disposes of the business as a capital transaction.

It is believed that this solution is compatible with a 1921 ruling of the Commissioner in O.D. 1018, 5 Cum. Bull. 119, relative to the deductibility of amounts paid for data regularly used in a business supplying information to customers on a regular basis. There the problem concerned title abtract companies which must constantly obtain necessary data in order to conduct their business. The Commissioner stated:

Title abstract companies incur relatively large and continuous expenditures in keeping their plants up to date, such as the expense of adding and incorporating in the plant records that are being made daily in the various courts and in the Recorder's office.

These records which are added to and incorporated in the plant for the purpose of keeping it in up to date running order and preventing depreciation are in the nature of ordinary and necessary repairs. The expenses, therefore, incurred in making such records are current expenses, and as such are deductible for the year in which incurred and paid or accrued.

*   *   *   *   *   *   *

The plaintiffs in Petition No. 242–66 are entitled to a judgment in accordance with this opinion and judgment should be entered for plaintiffs, with the amount to be determined pursuant to Rule 131(c). The defendant is entitled to judgment on its counterclaim in Petition No. 433–66; however, the entry thereof should be deferred pending determination of the plaintiffs' case in chief in that litigation.

Findings of Fact

1. These are civil suits for refund of income taxes which arise under the Internal Revenue laws of the United States. Jurisdiction is conferred upon this court by Section 1491 of the Judicial Code (28 U.S.C. § 1491). They are joined for disposition of one issue common to each which arises from the same transaction in 1962, namely, the acquisition in that year by Lea Associates, Inc. (hereafter "Lea"), of a separable portion of Davee's business.

2. (a) Plaintiffs Ken M. and Adeline B. Davee are a married couple residing at 1550 North Lake Shore Drive, Chicago, Illinois. In 1962 Davee was 54 years old, in good health, prosperous, had been in market research since the early 1950's, and was the key factor in sales by his sole proprietorship which had gross income that year of about $1,800,000.

(b) Plaintiff Lea Associates, Inc., is a Pennsylvania corporation. Mr. Franklin S. Osgood is president.

3. During the years in issue, plaintiff Ken M. Davee (hereinafter "Davee" will refer to both husband and wife, unless otherwise indicated) operated as an individual proprietor several distinct marketing research services for pharmaceutical manufacturers and others, each service being geared to the furnishing of a specified type data for a particular purpose to a particular market.[1]

4. One such marketing research service, founded by Davee in 1958, consisted of the regular and periodic publication of a report containing detailed statistical information describing the practices of physicians in the United States with respect to the prescription, use and effectiveness of ethical drugs.

[1] These services included reports on the domestic hospital and drugstore markets, and reports on the drugstore markets in several foreign countries.

5. The information which ultimately went into the periodic issues of such report was collected by plaintiff's staff from a panel of 1,500 physicians located throughout the United States. The 1,500 physicians were a statistical model devised by Davee to provide an accurate weighted sample of all physicians in the United States.

6. Davee obtained the information from the physicians through their cooperation and through the efforts of interns in each area who worked with plaintiff's organization. Each physician in the sample was required to fill out each month a certain form booklet supplied by plaintiff. He entered in the book the name, age and sex of all patients he had seen in a specified 48-hours' period, what his diagnosis was as to each patient, what drugs he had prescribed for treatment, and if a drug had previously been prescribed, his opinion as to the effectiveness of the drug or drugs used. The area intern saw to it that the physician was reminded at the beginning of his specified 48-hours' period to collect the data, and aided in the collection of the books and the necessary paperwork. The area interns, and in some cases the physicians, were paid to furnish the information.

7. The completed booklets were mailed to Davee's office in Chicago, Illinois, where his employees classified the information by giving a numerical code number to each item of information. The numerical coding system used for the various diagnoses was devised by Davee, but was based upon a less detailed coding system devised by the World Health Organization.

8. After the data from the physicians was numerically coded, it was punched onto I.B.M. cards by other employees of Davee. The information on the I.B.M. cards was then fed into a computer and a printout sheet prepared for each drug and for each diagnosis. The information was then tabulated, indexed and published monthly and semi-annually in sizable volumes which Davee entitled "Pharmaceutical Market-Physicians". The service was known informally as the "Physicians' Panel" or "Physicians' Report", and will be referred to hereafter as "Physicians' Panel."

9. Davee first considered starting the Physicians' Panel in 1957, to supplement his existing marketing reports then in

operation in related fields. This task required a few thousand man-hours per month for from three to six months. The work was done by a staff of six to eight and as many as 20 clerks. The preliminary steps that were necessary in starting the Physicians' Panel included investigation of what types of information and what format for a report might be most useful to prospective customers in the pharmaceutical industry, then designing and building a statistical model that would be representative of all physicians in the United States, then designing and implementing a data-gathering procedure which included obtaining physicians who were willing to cooperate, and devising methods and procedures whereby information from the physicians was analyzed, processed and put into a useful format. Then a finished first report was produced which could be demonstrated to prospective customers.

10. After the initial report was developed, Davee's next task was to sell the report to prospective customers on contracts containing a 90-days' cancellation clause. Due to the high cost and highly specialized nature of the report, the business had only a limited number of potential customers, all of whom were large pharmaceutical houses and ethical drug manufacturers. Plaintiff sent letters to all such potential customers in the pharmaceutical industry informing them of the creation of the Physicians' Panel. He and his staff met with executives and research technicians on the staffs of prospective customers to demonstrate and explain the uses of the data contained therein, and the advantages of the Physicians' Panel over the then existing report by plaintiff Lea (National Disease and Therapeutic Index, or NDTI)[2] publishing similar information. Davee persuaded six NDTI customers to switch to Physicians' Panel.

11. After a customer agreed to subscribe to the Physicians' Panel, informing and training the personnel of the customer in the various uses of the Panel was a continuing educational process requiring the time of Davee and his staff. However, after a customer had subscribed to the Physicians' Panel for a time, and its marketing and research personnel became familiar with the format and method of presentation of the

[2] NDTI is described in finding 14. *infra*.

data, less time and effort of plaintiff and his staff was required for this training.

12. The Physicians' Panel, when started by Davee in 1958, had no customers. By December 1961 it had 18 customers who comprised about 50 percent of the potential pharmaceutical market for such a service. Each customer paid a minimum of $25,000 per annum for the service. All but three of these customers as of December 1961 were long-term, regular subscribers to the Physicians' Panel. In contrast, as of September 1960 NDTI had 14 customers, and increased to 20 customers by 1962 due to switches from Physicians' Panel.

13. As of the last month in which Davee published the Physicians' Panel (June 1962), there were 14 customer-subscribers, while NDTI had 20 customers. Davee's gross income from the Physicians' Panel in the year 1961 was $406,253, and his net income therefrom was $89,386. The gross income from the Physicians' Panel in the month of June 1962 was $29,167, and the net income was $3,805. Davee's gross income from his total business in 1962, including the Physicians' Panel, was about $1,800,000. At the times relevant to the issues in this case Lea was not aware of nor interested in ascertaining the financial returns of Davee from the Physician's Panel.

14. Neither Lea nor any of its shareholders was or is related to Davee in any way. In 1962 Lea was publishing a marketing research report on the use of ethical drugs by physicians in the United States known as the "National Disease and Therapeutic Index", or "NDTI". The NDTI had been first developed in 1955 by Taylor, Harkins & Lea, Inc. In 1960 Taylor, Harkins & Lea was in financial difficulty and was reorganized as Lea Associates, Inc., with new management. The NDTI and the Physicians' Panel, while different in sample makeup, format, codes, and other details, were relatively coextensive in the type of information and services which were provided to customers. Davee was familiar with NDTI at the time he founded Physicians' Panel in 1958. Findings 4 through 12 describing the operation of Davee's Physicians' Panel are in many respects generally applicable to the operation of NDTI. Physicians' Panel and NDTI were sole competitors.

15. (a) In early 1962 Lea, through its president, Franklin T. Osgood, Jr., approached Davee with an offer to buy the Physicians' Panel. In a letter dated March 1, 1962, Osgood wrote to Davee suggesting a meeting to "try an idea out on you."

(b) Lea's "idea", which involved the acquisition of Davee's Physicians' Panel business so as to eliminate competition and make it possible for Lea to acquire contracts from Davee's former customers, was predicated upon a forecast estimate Lea made of the effect such acquisition would have upon Lea's net profits after taxes. This forecast, which is in evidence as Defendant's Exhibit 8 and is not dated, is based upon alternate hypotheses of Lea acquiring ten or eight additional customers at $28,000 and $25,000 per year each, respectively. The forecast estimates that under these conditions Lea's operating profits (*i.e.*, before annual reduction by taxes and amortization expense of acquiring Davee's business for $350,000 payable in five equal annual installments of $70,000 each) would be increased by either $205,000 or $100,000 per year, depending on whether Lea eventually contracted with ten or eight additional customers. On the same theory Lea's net profits after taxes would increase by either $65,000 or $14,500 per year for five years by the end of which period the purchase would presumably be fully amortized. Finally, on the same hypotheses, plaintiff's net profit before taxes would increase by either $135,000 or $30,000 per year.

16. Following the letter, Davee and Osgood met in a hotel in New York City. Osgood's offer of $350,000 on behalf of Lea was acceptable to plaintiff. Osgood's purpose in wanting to purchase this part of Davee's business was to remove Davee's service from the field of competition since there was not a sufficient number of clients to support both services. Davee's understanding was that he was selling all of this particular part of his total business.

17. Following the meeting in New York an undated first draft of an agreement was submitted to Davee by Osgood for Lea. The draft contained a provision that—

> Three-sevenths of the total amount to be paid by Lea hereunder shall be considered to relate to the covenant of Davee not to compete as set forth in paragraph 3 hereof.

Allocation of the sale price to a covenant not to compete or to other categories of assets had not been discussed at the meeting in New York. Osgood did not want to include goodwill in the description of assets because he knew this type of asset could not be depreciated for tax purposes. Davee believed that the tax treatment for payments not to compete would be "impossible" and "ambiguous", and that he could not figure out a basis for separating anything from the total sale, and his attorney advised him that a mere covenant not to compete would be illegal in his opinion.

18. In response to this draft Davee submitted his own proposed agreement to Osgood. Davee's proposed draft also contained a covenant not to compete, but no allocation of the sales price to such covenant was attempted. Lea knew that payments for a covenant not to compete were deductible for tax purposes.

19. On May 11, 1962, Osgood commented upon Davee's proposed draft agreement to which he proposed additions and deletions, including a suggestion that "for our mutual tax purposes" the covenant not to compete should be for three years rather than five. His comment on a provision to guarantee payment by Lea of the full purchase price by installments was—

> As I see it, without notes, you are somewhat in the position of a car salesman—if we fall down on payments, you re-possess the car. In our case, the car is rather intangible, but still I think an agreement can be worded.

Osgood remarked further on a provision whereby the total price paid to Davee would be increased up to $37,500 depending upon how soon Davee was able to complete the terms of the contract. As to this Osgood stated—

> My lawyer is still worrying the problem of assigning values to the data vs. the covenant not to compete. If we don't assign a [sic] least some value to the latter, he is afraid the tax people will do it for us—it obviously has some value.

20. In response to Osgood's comments, Davee and his attorney submitted a revised draft of the agreement to Osgood under a covering letter of May 24, 1962. Section 4 of the earlier draft, entitled "Non-competition", was removed from the basic agreement, and a separate letter agreement was

substituted providing for part-time consultation to Lea by Davee and wife, as well as a fully restrictive covenant not to compete by Davee and his wife for three years. The letter agreement provided also a payment of $10,000 per year for three years for Davee's consulting services. The sale price of the basic agreement was correspondingly reduced from $350,000 to $320,000. Davee's covering letter explained—

> Third, a separate contract has been prepared in which I serve as consultant for the contemplated three years guaranteeing non-competition during that period. The compensation for this period, which obviously is a current expense item for you, is subtracted from the base price.

Although the inference is that Davee prepared the revised sale agreement and letter agreement dated May 24, 1962, the latter is in the form of a letter from Lea to Davee (PX-22) and couples the payment of $10,000 per year for three years to compensation for Davee's consultant services during that period, while the paragraph in the letter agreement constituting the covenant not to compete for three years does not expressly refer to compensation. However, Davee's covering letter of May 24, 1962, in referring to the letter agreement which he prepared, speaks of the compensation in an unstated amount to be for the consultant services and the non-competition promise, as the portion of the letter quoted above in this finding shows.

21. In the week following May 24, 1962 Davee met with Messrs. Osgood, Waite and West of Lea, and with Messrs. Russell and Lea, attorneys for Lea, in order to work out final details of the transaction. On May 31, 1962 Davee and Lea entered into an agreement (hereinafter referred to sometimes as the sale agreement) for the sale of Davee's Physicians' Panel to Lea.

22. Contemporaneously Davee and Lea entered into a supplemental letter agreement dated June 1, 1962 (hereinafter referred to sometimes as the letter agreement).

23. The May 31, 1962 sale agreement provides, in pertinent part, as follows (Plaintiff's Exhibit 6):

(a) Section 1, entitled "Description of Davee Business", sets forth a brief description of Davee's marketing research

businesses then in operation, including the Physicians' Panel. Each is referred to as a "Panel".

(b) Section 2, entitled "Description of Business of Lea", provided:

> Lea presently operates a service similar to the Physicians' Panel of Davee which is known as the "National Disease and Therapeutic Index" (hereinafter for convenience referred to as the "NDTI"). Lea wishes to expand its NDTI service by purchasing, subject to the terms and conditions of this Agreement, the Physicians' Panel of Davee.

(c) Section 3, entitled "Sale of Physicians' Panel", provided that "Davee hereby agrees to sell and Lea hereby agrees to buy Davee's Physicians' Panel pursuant to the terms and provisions of this Agreement * * *."

(d) Section 4, entitled "Continued Operations by Davee", provided that Davee was permitted to continue to operate the other marketing research services which he then conducted, and continued:

> Davee will not for a period of five (5) years from the date of the Consummation of the sale hereunder as provided in Section 6 hereof solicit or obtain any reports or data from physicians within the United States of America unless the same is done for a single customer or as a single survey non-repetitive in character and non-competitive with the regular service to subscribers of Lea's NDTI.[3]

(e) Section 5 stated the purchase price to be $320,000, payable $50,000 down, plus annual installments of $54,000 commencing January 1, 1963.

(f) Section 6, entitled "Consummation of Sale", provided that Davee should after a certain date collect no further data for his Physicians' Panel, and specified that:

> As soon after the execution of this Agreement as is practical, and not later than thirty (30) days thereafter, Davee shall deliver to Lea samples of all of his past reports and casebooks dating from January 1, 1958 to the present with respect to the operation of his Physicians' Panel. After December 31, 1962, but before April 1, 1963, all of his reports through the final report of 1962, including IBM cards, casebooks and other material used in

[3] This differed from the comparable provision of earlier drafts by prohibiting Davee for five years instead of three.

> the conduct of said Physicians' Panel, all to the end that after the consummation of said purchase Lea shall be in a position to utilize these data and materials in the operation of its NDTI service and the business sold hereunder.

(g) Section 7, entitled "Early Consummation", provided for an increase in the purchase price of the business of $37,500 if the consummation date would be advanced to prior to July 6, 1962, or $18,750 if prior to October 5, 1962.

(h) Section 8 provided that Davee was to have an option to require transfer to him by Lea of both the Physicians' Panel and the NDTI business of Lea upon a default in payment of the notes given by Lea.

(i) Section 9 provided that Lea was entitled to a return of all amounts paid to Davee under the contract, and cancellation of the notes, upon default by Davee of any of the provisions in Sections 3, 4, and 6 of the agreement.

(j) Section 10 sets forth Davee's warranties which relate primarily to the minimum sales figures in the year ending December 31, 1961, and billings for the month of May 1962.

(k) In Section 11 Lea agreed to assume all of Davee's obligations to the Physicians' Panel subscribers with respect to which Davee gave Lea actual notice and which were enumerated in an attached schedule.

(l) Section 12 provided for a payment of a commission to Davee if subscribers to the Physicians' Panel became subscribers of Lea's NDTI prior to the consummation date. Sections 13 and 14 were formalities dealing with "Notice" and "Applicable Law."

24. The sale agreement of May 31, 1962, contains no allocation of any portion of the purchase price by the parties to a covenant not to compete. Nor does it contain any allocation to the covenant of Davee in Section 4 not to solicit or obtain reports or data from physicians in the United States.

25. The fully restrictive covenant not to compete as originally drawn in the first draft submitted to Davee by Lea, and as contained in Davee's responsive draft agreement, was included in the letter agreement of June 1, 1962. This letter agreement confirmed the sale, provided compensation of $6,000 per year for five years for the consulting services of Davee and wife, contained a payment in the event of death

provision, and provided the following covenant not to compete:

> It is also understood that during the five years following the consummation date, neither of you [*i.e.*, neither Davee nor his wife] will engage directly or indirectly as owner, manager, operator or associate or in any other capacity in the operation or control of any panel based on data obtained from physicians within the United States of America, nor will anyone employed by you engage in the operation or control of such a panel in the course of such employment. The foregoing agreement by you shall not be deemed to be broken by the continued operation by you of your business as provided in said agreement of sale. * * *.

26. The final letter agreement of June 1, 1962, differed from the draft submitted earlier by Davee in the following respects: the total $30,000 for the covenant not to compete and the consultation services was spread over a period of five years instead of three, Mrs. Davee was included as a consultant, provision was made for continued payment in the event of death, the non-competition provision that had been transferred from the first draft of the letter agreement was extended to the originally proposed term of five years.

27. Both parties consulted with their respective attorneys throughout the negotiations described above and evidenced awareness of the legal and tax consequences of the sale. There is no evidence of fraud, mistake or duress influencing the transaction.

28. Davee took advantage of the early consummation provision in Section 7 of the May 31, 1962 sale agreement and as of July 1, 1962, he stopped providing the Physicians' Panel to his customers. Since the contracts between Davee and his customers were canceled there was no occasion for Lea to assume Davee's obligations to such customers. Thereafter, Davee commenced delivery of the casebooks, files, lists, codes, I.B.M. cards and back data to Lea. Lea needed some of these materials, collectively referred to as "back data", in order to be able to provide a continuity of data for former customers of Davee, and to answer such clients' questions during the transition period "when ex-Davee purchasers, we hoped, were becoming NDTI purchasers". Not all of the data was delivered; however, Lea had the right to all of it.

No direct value to Lea's NDTI was added by the materials because the sampling and statistical bases were significantly different. The materials in Lea's hands were, however, of indirect value to Lea by virtue of depriving Davee of them and making it more difficult for him to reenter the field.

29. No employee of Davee working on Physicians' Panel transferred to Lea following the sale, and there was no significant reduction of personnel by Davee resulting from the transaction. Lea did not request, and if received did not use, Davee's list of interns who coordinated information from Davee's panel of physicians. Nor did Lea use the services of the physicians serving on Davee's Physicians' Panel.

30. Approximately three months after the closing, acting unilaterally upon the request of its accountant, Lea assigned a subjective value of $75,000 to the back data received from Davee.

31. On June 11, 1962, Osgood, on behalf of Lea, wrote to Davee—

> Enclosed is our check for $50,000, the amount payable on execution of the agreement entered into on May 31st, 1962, by Ken M. Davee and Lea Associates for the sale of your Physicians' Panel.

32. No customer contracts, as such, or name of Davee or Physicians' Panel, were transferred by Davee to Lea as part of the sale. All such contracts were cancelable upon 90-days' notice. To carry out the sale agreement, Davee caused the cancellation of all such contracts, and Lea then immediately undertook to obtain these former subscribers to the Physicians' Panel as subscribers to its NDTI.

33. Lea's principal purpose in buying the Physicians' Panel was the expectancy that, with Davee out of the way, the customers of the Physicians' Panel would become customers of the NDTI. To this end, immediately after the consummation of the sale, Lea wrote to all of Davee's former customers as follows:

> For the past several years Ken Davee and I have both been aware of the difficulties of running simultaneous physician panels. While competition is theoretically desirable, it has also caused difficulties. For one thing, we are both heavily sampling the smaller physician specialties—and bumping heads. The depth of these studies, the number of case histories and the variables involved, make physician panels more expensive to operate than most people imagine. For example, we have a permanent office staff of 40 people, and a field group of 50 resident physicians working on our panel, the NDTI. Unless an even division of clients is maintained between the services, only one panel can return a profit.
>
> Primarily for these reasons, it seemed desirable to both of us to eliminate duplication. As you have already heard from Ken Davee, last month Lea Associates purchased Davee, Koehlein & Keating's Physician Panel, including all back data.
>
> Quite obviously we would like to have you subscribe to the N.D.T.I., our physicians' panel. In the past two years we have made improvements, which I think make the service more usable than previously. As a start, we would like to visit you and discuss N.D.T.I. In the next month or so we also intend to hold another of our school sessions; this time we will include discussion of the similarities and differences between the panels, to make changeovers as smooth as possible. These meetings normally last two days and cover in detail the operation, uses, and misuses of N.D.T.I. data. If you are interested in the N.D.T.I., we hope you or members of your staff can attend and evaluate us further.
>
> Two of your immediate questions are probably the cost of N.D.T.I. and the availability of back data. The price for N.D.T.I. has been $28,000 per year, but it is now reduced to $25,000. Back data will be available at no additional charge. We plan to rerun additional copies of the 1961 reports, and handle earlier years on a client request basis.
>
> The measure of our performance is the satisfaction or dissatisfaction of our current clients. I have attached a list of companies now subscribing to N.D.T.I. and the persons most directly involved.
>
> I hope to see you shortly, but if you have questions meanwhile, please call.

34. A similar letter was sent by Lea to all current NDTI subscribers. That letter also stated—

> * * * Lea Associates purchased Davee, Koehlein & Keating's Physicians' Panel, including all back data.

35. At the time of the negotiations and thereafter, Davee had viewed the substance of the transaction with Lea as a sale. He considered the asset sold to be "our Physicians' Panel, a going business". There was no audit by Lea of

Davee's books to determine his net income, no transfer of receivables, and no assumption of liabilities. Nor is there evidence that Davee had any receivables and liabilities allocable to Physicians' Panel. Lea had a fairly good idea of Davee's gross income from that service, which apparently satisfied Lea's needs since there is no evidence of a request by Lea to Davee for detailed financial data, which was of no interest to Lea. Davee would not have accepted the same amount of money for a mere covenant not to compete, as he was fearful that such an agreement might not be legally enforceable and considered the tax consequences "impossible".

36. During the course of the negotiations, Lea had suggested that as much as three-sevenths of the agreed price be allocated to Davee's covenant not to compete (finding 17, *supra*). These suggestions were rejected by Davee. Neither party could agree on the value of the covenant not to compete. During the course of the negotiations, Davee agreed to reduce the purchase price by $30,000 and to have that sum paid to him and his wife under a separate contract for consultation services and the covenant not to compete (see findings 20 and 23(e), *supra*). The parties never contemplated that Davee and wife would render any substantial services as consultants to Lea as provided under the letter agreement.

37. The substitution of the letter agreement was intended by the parties as an agreement that $30,000 (the consideration specified therein) was to be treated as ordinary income to the seller and a deductible expense to the buyer.

38. Pursuant to the payment schedule as set forth in the May 31, 1962 contract, during the years 1962 and 1963 Davee received $87,500 and $54,000 of the purchase price specified therein from Lea. Pursuant to the June 1, 1962 letter agreement, during the years 1962 and 1963, Davee and his wife received $3,000 and $6,000 from Lea for consulting services and for their joint covenant not to compete. The consulting services rendered were *de minimus*. Davee and his wife duly filed joint Federal income tax returns for the years 1962 and 1963 and on said returns for these years they reported the payments under the May 31, 1962 contract as a capital gain and elected the installment method. They reported the payments under the June 1, 1962 letter contract as ordinary income.

39. The joint return of Davee and wife for the year 1962 showed a total tax liability of $156,393.50, total withholding, estimated tax payments, and credits of $110,215.04. They paid the balance due (an additional $46,178.46) upon the filing of the return. Their return for the year 1963 showed a total tax liability of $17,142.66, total payments and credits of $50,849, and a resulting overpayment of $33,706.34 which was to be applied to the 1964 estimated tax. They filed an amended return and a claim for refund for 1962 on November 26, 1963, claiming a refund of $2,309.83 based upon their failure to deduct certain bank charges on their original 1962 return. Such amount has not been refunded to them. On October 9, 1964, they paid defendant $48,919.72 as additional income tax for the year 1962.

40. On January 19, 1965, the District Director of Internal Revenue sent to plaintiffs Davee a notice of proposed deficiency in income tax based upon the determination by a revenue agent that amounts received for the sale of the Physicians' Panel were ordinary income.

41. On March 26, 1968 plaintiff Lea executed and filed with the Internal Revenue Service Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, thereby consenting to a tax assessment of $40,690.02 for the taxable year 1962, which assessment was based on the disallowance of a deduction taken by Lea in 1962 for payments made to Davee under the sale and letter agreements of May 31 and June 1, 1962, as amortizable expenses attributable to a covenant not to compete. With the authorization of the Commissioner of Internal Revenue the defendant filed a counterclaim to the claim in petition No. 433–66 demanding judgment in the amount of $53,167.36 (tax deficiency of $40,690.02 plus interest of $12,477.34) which the counterclaim alleges was assessed against the plaintiff and has not been paid. The plaintiff's answer to the counterclaim neither admits nor denies the assessment but admits the assessed deficiency has not been paid.

42. In 1962 Davee commenced a new marketing research business consisting of the periodic publication of a report en-

titled "Pharmacies-France" containing detailed statistical information on the ethical drugs sold in France. The report was based upon data furnished by a cooperating group of French drugstore owners and operators. In 1962 Davee paid a French management consulting firm $12,257.50 for its services in obtaining sources of data for "Pharmacies-France", and in 1963 $2,353.55 was paid to the same firm for similar services. Not only for the French Panel, but for all reports published by Davee, it was always necessary to recruit people who would cooperate in furnishing data. Constantly, certain sources of data were no longer willing or able to supply data, and these sources had to be replaced by others.

43. The particular services for which Davee paid the French firm were for enlisting the cooperation of some 400 French pharmacies, securing replacements as needed, reimbursement for payments to the cooperating sources, and monthly visits to microfilm records.

44. On their Federal income tax returns for 1962 and 1963, the plaintiffs deducted these amounts paid to the French firm as ordinary and necessary business expenses. The District Director of Internal Revenue, adopting a Revenue Agent's report for the years 1962 and 1963 dated November 24, 1964, determined that such amounts were—

> * * * [Expenditures] * * * associated with the start-up of Marketing Research for the collection of data in France.
>
> This expenditure incurred by the taxpayer represents a capital expenditure that is not subject to depreciation due to its indefinite life.

Accordingly, the deductions were disallowed.

45. On March 9, 1965, Davee and his wife paid to defendant the amount of $102,857.22 representing proposed deficiencies in income tax of $70,233.83 and $23,448.07 for the years 1962 and 1963, respectively, plus $9,175.32 as interest thereon. On or about October 26, 1965 plaintiffs Davee filed with the District Director of Internal Revenue, Chicago, Illinois, claims for refund of income taxes and interest for the years 1962 and 1963 in the respective amounts of $78,167.37 and $25,111, or such greater amounts as may be legally refundable.

46. More than six months have elapsed from the date of the filing of said refund claims, and no decision thereon

has been rendered by the Secretary of the Treasury or his delegate.

47. The plaintiffs Davee and Lea are the sole and absolute owners of the claims herein presented. No assignment or transfer of said claims or any part thereof has been made. No other action has been had or is pending on said claims in any other court or in the Congress of the United States, and no part of the amount claimed has been received by the plaintiffs.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs in No. 242–66 are entitled to recover and judgment is entered for plaintiffs, accordingly, with the amount of recovery to be determined pursuant to Rule 131(c). In Case No. 433–66, defendant is entitled to recover on its counterclaim, however, the entry of judgment is deferred pending determination of plaintiffs' case in chief in that litigation.

U.S. GOVERNMENT PRINTING OFFICE: 1971

IN THE UNITED STATES COURT OF CLAIMS

No. 433-66

ELIZABETH KLINE JORDAN AND

LEA ASSOCIATES, INC.

v.

THE UNITED STATES

ORDER

On June 11, 1971, the court rendered an opinion holding that defendant was entitled to recover on its counterclaim. The determination of the amount of recovery was deferred pending determination of plaintiffs' case in chief in that litigation (195 Ct. Cl. 184, 219).

On October 21, 1975, the trial judge of this court filed a memorandum report recommending that, in accordance with the opinion of the court and the stipulation of counsel as to judgment, judgment be entered in favor of defendant on its counterclaim in the sum of $40,690.02, plus interest according to law and that the petition with respect to all remaining issues be dismissed with prejudice, which recommendation is adopted by the court.

IT IS THEREFORE ORDERED that judgment be and the same is entered for the defendant in the sum of forty thousand six hundred ninety dollars and two cents $40,690.02), plus interest according to law and that the petition with respect to all remaining issues is dismissed with prejudice.

By the Court
October 30, 1975 COWAN
Chief Judge

APPENDIX B

Provisions of Internal Revenue Code

In computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible). (Sec. 161 Internal Revenue Code 26 USCS § 161)

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered; . . .

(Sec. 162 Internal Revenue Code 26 USCS § 162)

(a) *General Rule.*—No deduction shall be allowed for—

(1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate. (Sec. 263 Internal Revenue Code 26 USCS § 263)

AGREEMENT

THIS AGREEMENT entered into this 31st day of May, 1962 by and between KEN M. DAVEE, individually and doing business as Davee, Koehnlein & Keating, an individual proprietorship, (hereinafter for convenience referred to as "Davee"), and LEA ASSOCIATES, INC., a Pennsylvania corporation, with its principal office located in Flourtown, Pennsylvania (hereinafter for convenience referred to as "Lea").

WITNESSETH:

Section 1. Description of Davee Business. Davee presently operates a marketing research business under which he collects data from physicians, drugstores and hospitals and similar sources and reports the data monthly, quarterly and semi-annual reports to subscribers. Said business includes the following activities among others:

(a) A physicians' panel entitled "Pharmaceutical Market-Physicians" which consists of the compilation of reports for the benefit of subscribers, based upon the periodic and repetitive reports of a group of 1,500 physicians as to treatment, activities and opinions. As used herein, the term "Physicians' Panel" shall refer to such service operated by Davee described in this Subsection (a) since prior to December 31, 1958.

(b) A Drugstore Panel which represents a similar service based upon reports furnished by drugstore owners and operators, and which is hereinafter for convenience referred to as the "Drugstore Panel".

(c) A Hospital Panel which is a similar service based upon reports furnished by hospital administrative officers, and which is hereinafter for convenience referred to as the "Hospital Panel".

It has been the practice of Davee to sell the three Panels listed above in various combinations or packages. The price for the Physicians' Panel service alone has regularly been $35,000.00 annually but if the Physicians' Panel is sold in combination with either the Drugstore or the Hospital Panel it has been sold in such combination at a price of $25,000.00. In addition to the regular permanent panels described above, Davee from time to time undertakes further separate marketing research survey work not based upon such periodic and repetitive reports.

Section 2. Description of Business of Lea. Lea presently operates a service similar to the Physicians' Panel of Davee which is known as the "National Disease and Therapeutic Index" (hereinafter for convenience referred to as the "NDTI"). Lea wishes to expand its NDTI service by purchasing, subject to the terms and conditions of this Agreement, the Physicians' Panel of Davee.

Section 3. Sale of Physicians' Panel. Davee hereby agrees to sell and Lea hereby agrees to buy Davee's Physicians' Panel pursuant to the terms and provisions of this Agreement. Nothing in this Agreement shall be treated as effecting the sale by Davee of any other panels presently conducted by him whether regular permanent panels or panels set up for a specific non-repetitive study, nor shall Lea use Davee's name or the name "Physicians' Panel" or "Pharmaceutical Market-Physicians" in connection with its operations.

Section 4. Continued Operations by Davee. The parties hereto contemplate that after the effective

date of the sale to be consummated hereunder, Davee may continue the operations of the Drugstore and Hospital Panels and may continue to operate and to establish physicians' panels involving reports from physicians located outside of the United States of America and any other enterprises, directly or indirectly. Davee will not for a period of five (5) years from the date of the consummation of the sale hereunder as provided in Section 6 hereof solicit or obtain any reports or data from physicians within the United States of America unless the same is done for a single customer or as a single survey non-repetitive in character and non-competitive with the regular service to subscribers of Lea's NDTI.

Section 5. Purchase Price. The purchase price for the Physicians' Panel sold hereunder shall be the aggregate sum of $320,000.00 which shall be payable in accordance with the following provisions:

(a) $50,000.00 shall be payable on the execution and delivery of this Agreement.

(b) The balance of the purchase price shall be evidenced by five (5) notes executed by Lea, each note to be in the form of the note attached hereto as Exhibit A and each note to be in the principal amount of $54,000.00, the first to be payable on the first business day after January 1, 1963 and the remaining notes to be payable on the first business days of the next succeeding years, respectively, said notes to be delivered concurrently with the execution hereof.

Section 6. Consummation of Sale. The manner of consummating the sale provided in this Agreement shall be as follows:

(a) Davee shall collect no further data for his Physicians' Panel service sold hereunder after the

completion of collection of data for his regular December, 1962 report. The date of the complete discontinuance of such collection shall be the consummation date for the purpose of this Agreement.

(b) As soon after the execution of this Agreement as is practical, and not later than thirty (30) days thereafter, Davee shall deliver to Lea samples of all of his past reports and casebooks dating from January 1, 1958 to the present with respect to the operation of his Physicians' Panel. After December 31, 1962, but before April 1, 1963, all of his reports through the final report of 1962, including IBM cards, casebooks and other material used in the conduct of said Physicians' Panel, all to the end that after the consummation of said purchase Lea shall be in a position to utilize these data and materials in the operation of its NDTI service and the business sold hereunder.

Section 7. Early Consummation. Lea desires to have the consummation date for the sale provided herein to be held at a date earlier than the one specified in Section 6 hereof, but the parties hereto recognize that such early consummation cannot be effected without the consent of all of Davee's subscribers. It is understood that Davee shall have the right to specify an earlier consummation date than the one provided in Section 6 hereof if Davee shall obtain the consent thereto of all of Davee's subscribers to said Physicians' Panel and thereafter Davee shall collect no further data for his Physicians' Panel service. If such earlier consummation date shall be on or prior to October 5, 1962 the purchase price for the business sold hereunder shall be increased by the amount of

$18,750.00; if such earlier consummation shall be on or prior to July 6, 1962, then the purchase price shall be increased by the aggregate amount of $37,500.00. Such additional amounts shall be payable on December 1, 1962.

Section 8. Rights in Event of Default on Notes. If there is a default under one or more of the notes mentioned in Section 5 hereof or a failure to pay the additional amounts due under Section 7 hereof, if any, and if such default is not cured by Lea within ten (10) days after receipt of notice thereof from Davee, Davee shall have the option to require Lea to transfer to Davee the business sold hereunder together with Lea's NDTI business in accordance with the following provisions:

(a) Davee's rights to acquire the business sold hereunder and Lea's NDTI business shall be exercised by written notice to Lea, which notice shall specify the date on which the same shall be transferred to Davee, which date shall be not less than fifteen (15) days following the date of such notice.

(b) On the transfer date specified on such notice Lea shall deliver to Davee all of the reports, casebooks, IBM cards, records and other material used in connection with the businesses so to be transferred and shall permit Davee to use existing Lea facilities (including items leased by Lea) for a period of not more than ninety (90) days for the continued storage of the same and the continued operation thereof, at Davee's expense, at the end of which period Davee shall cause all of the same which he desires to remove to be removed at Davee's expense; provided, that Davee shall be entitled to all revenues of NDTI

earned after the beginning of such ninety (90) day period.

(c) Upon the performance of Lea's obligations under paragraph (b), said notes of Lea delivered hereunder shall be cancelled and no further payments shall be due from Lea to Davee.

(d) It is understood that Lea shall be responsible for any unusual operating expenses incurred as the result of the turn-over of said business to Davee under this section and concurrently herewith shall deposit in the escrow, with an independent escrow agent satisfactory to Davee, the sum of $5,000.00 to be used for the payment of unusual operating expenses in connection with such turn-over. Such amount so deposited shall be applied to the payment of the last note to become due in the event there is no default prior to such date.

Section 9. Defaults by Davee. In the event Davee fails or refuses to perform any of the obligations undertaken in Sections 3, 4 and 6 hereof, he shall return to Lea all amounts theretofore paid and the notes delivered pursuant to Section 5 hereof as well as the $5,000.00 delivered in escrow pursuant to Section 8. In addition, Davee shall also pay to Lea all out-of-pocket costs incurred in connection with the negotiations between the parties heretofore conducted, including reasonable attorneys' fees. Davee shall not be considered to be in default hereunder until sixty (60) days after the receipt of notice of default by Lea during which period Davee shall not have discontinued such default.

Section 10. Warranties. Lea is familiar with the Physicians' Panel of Davee and Davee makes no

warranties or representations concerning said Panel except that Davee warrants (a) that sales by Davee attributable to Physicians' Panel during the year ending December 31, 1961 were not less than $400,000.00 and that billings for the month of May, 1962 for said Physicians' Panel were not less than $29,000.00; (b) that Davee has the right to make the transfer herein provided for; and (c) that such transfer is and will be free of all liabilities and claims whatsoever other than as herein specified.

Section 11. Assumption of Obligations. From and after the termination date for the future conduct by Davee of the Physicians' Panel, Lea agrees to assume all of Davee's obligations to subscribers of the Physicians' Panel with respect to which Davee has given Lea actual notice at the time of the execution of this Agreement, and which are enumerated in Schedule "A" attached hereto and made a part hereof.

Section 12. Substitution of Lea Service. In the event that any of Davee's present subscribers shall become subscribers of Lea prior to the consummation date, Lea shall pay to Davee a commission of $1,500.00 per month per subscriber until the end of 1962, provided that no such commission shall be paid for any subscriber whose contract has been cancelled by the affirmative action of Davee.

Section 13. Notice. Any notice to be given to either party hereunder shall be deemed duly given and received when deposited in the United States mail, postage prepaid, sent certified or registered, return receipt requested, and if given to Davee addressed to Davee at 105 West Adams Street, Chicago 5, Illinois, or if given to Lea addressed to Lea at 1526 Bethlehem Pike, Flourtown, Pennsylvania. Either party

may, by written notice given to the other, change its address for the purpose hereof.

Section 14. Applicable Law. This contract shall be interpreted and enforced in accordance with the applicable laws of the State of Illinois.

In Witness Whereof, the parties hereto have executed this Agreement on the day and year first above written.

Davee, Koehnlein & Keating

By /s/ Ken M. Davee

Lea Associates, Inc.

By /s/ Franklin T. Osgood, Jr.
President

June 1, 1962

Mr. Ken M. Davee &
Mrs. Adeline B. Davee
105 West Adams Street
Chicago 3, Illinois

Dear Mr. and Mrs. Davee:

We have purchased from Davee, Koehnlein & Keating its Physicians' Panel effective on a date to be determined in accordance with an agreement of sale dated May 31, 1962. This will confirm our understanding with each of you that during the five years following the consummation of said sale, each of you shall serve as consultants to the undersigned, Lea Associates, Inc. in connection with the operation by the undersigned of the business purchased from you.

Your aggregate compensation for acting in such capacity shall be at the rate of $6,000 per year payable during such five-year period monthly in advance. Such compensation shall not be adjusted in the event of the death of either of you. In the event of the death of both of you prior to the completion of such five-year period, we shall pay as a death benefit to the estate of the survivor an amount equal to $500, times the remaining months of such five-year period.

It is understood that we shall pay all traveling and out-of-pocket expenses incurred by you in providing services hereunder and that we shall not call upon you for services which will interfere with the continued conduct by you of the other services operated by you, nor shall we be entitled to call upon you for more than four days of services in any month without your consent.

It is also understood that during the five years following the consummation date, neither of you will

engage directly or indirectly as owner, manager, operator or associate or in any other capacity in the operation or control of any panel based on data obtained from physicians within the United States of America, nor will anyone employed by you engage in the operation or control of such a panel in the course of such employment. The foregoing agreement by you shall not be deemed to be broken by the continued operation by you of your businesses as provided in said agreement of sale.

Please confirm your agreement with the foregoing by signing and returning to us a copy of this letter.

Very truly yours,

Lea Associates, Inc.

By Franklin T. Osgood, Jr.
President

Approved: Adeline B. Davee

The foregoing is hereby confirmed.

Ken M. Davee

IX. PRETRIAL PROCEDURES

RULE 111. PRETRIAL ORDERS

(a) **General:** The commissioner may, in his discretion, direct the attorneys for the parties, or any party not represented by an attorney, to take such action in preparation for a pretrial conference or for trial as may aid in the disposition of the cause, including, but not limited to, any of the actions provided for in the subsequent paragraphs of this rule.

(b) **Parties To Confer:** The commissioner may direct any party to confer with any other party at any stage of the case on any matter pertaining thereto.

(c) **Admissions:** The commissioner may direct any party to serve on any other party a request for admissions under Rule 72.

(d) **Accounting:** (1) The commissioner may direct any party whose claim or counterclaim is based, in whole or in part, on books of account or other records of that party to furnish to any other party a statement showing the items and figures appearing in such books or records which the claimant intends to prove, with adequate references to the books or records from which such figures were taken, and to make all such books and records, or any part thereof, available for examination by the other party.

(2) The commissioner may direct any party to whom any statement of items and figures has been submitted under subparagraph (1) of this paragraph (d) either (i) to make an examination of the books and records of the submitting party and to furnish to such party a schedule or schedules showing the results of such examination, with specific references to the books and records from which were taken any figures that the examining party has found to differ from the figures contained in the statement submitted; or (ii) to waive any challenge of the accuracy of the statement submitted as reflecting the contents of the books and records of the submitting party.

(e) **Miscellaneous Schedules:** The commissioner may direct the submission (or a response to a submission) by any party (1) of statements of contentions as to the applicable measure of damages, or (2) of schedules of items and figures organized in such manner as to explain any assembly of figures (including computations and the components thereof) intended for use in support of a claim, counterclaim, defense, cross-statement, or offset.

(f) **Use of Accounting Schedules and Other Submissions:** No statement, schedule, submission, or response thereto made pursuant to paragraph (d) or (e) of this rule shall become evidence in a case until offered and received in evidence at a pretrial conference, at the trial, or upon the hearing of a motion or interlocutory proceeding; nor shall any verification of items or figures be deemed an admission of liability unless expressly so stated. The introduction into evidence of any such statement, schedule, submission, or response shall be subject to the same objections by any party as might be made to the introduction of other evidence.

(g) **Submissions:** (1) The commissioner may direct any party to submit to him (with a copy to any other party)—

(i) a short narrative statement (in the nature of an opening statement at the trial) of the proof to be adduced, either by oral testimony or by documentary evidence, or both;

(ii) a brief statement of his contentions in terms of ultimate facts and conclusions of law, and a succinct statement of points and authorities by way of analysis of legal issues;

(iii) a statement of the issues of fact in controversy;

(iv) a statement of the issues of law;

(v) a list of the prospective witnesses, giving as to each witness the name, address, and occupation, and the issue or issues of fact to which his testimony will be directed;

(vi) a statement showing the location or locations where the party desires that the witnesses be heard, and an estimate of the time that will probably be required in each location for the examination and cross-examination of the party's witnesses at that place; and

(vii) a statement as to when the party will be ready for trial.

(2) Notwithstanding any submission made in good faith pursuant to subparagraph (1) of this paragraph (g), a party may, for good cause shown, alter positions in relation to facts or law, or call witnesses other than those listed, in order to meet the exigencies of the case as it develops.

(h) Preliminary Pretrial Memorandum: The commissioner may direct any party to prepare and submit to any other party a memorandum containing all matters requisite to a pretrial conference at which agreement may be sought as to the authenticity and admissibility of documents, uncontroverted facts, issues of fact, issues of law, and the time and place (or places) and probable duration of the trial.

RULE 112. PRETRIAL CONFERENCES

(a) Scheduling of Pretrial Conference: In any action, the commissioner may, in his discretion, direct the attorneys for the parties, or any party not represented by an attorney, to appear before him prior to trial in order to consider—

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of avoiding unnecessary proof (i) by the admission of facts and (ii) by the reception of documents in evidence;

(4) the limitation of the number of expert witnesses and the exchange between the parties prior to trial of written statements by such witnesses comprising their direct testimony in the action (*cf.* Rule 71(b)(2));

(5) incorporating in the record factual data or documentary evidence pursuant to proceedings theretofore had under Rule 111; and

(6) such other matters as may aid in the disposition of the action.

(b) Authority of Attorneys: An attorney appearing at a pretrial conference on behalf of a party, whether the United States or a private party, should preferably be the attorney who will try the case for such party, be thoroughly familiar with the case, and be authorized to act for the party he represents at the conference.

RULE 113. PRETRIAL MEMORANDUM OR ORDER

The commissioner shall make a memorandum or order reciting agreements reached, orders made, and actions taken at any pretrial conference under Rule 112 or pursuant to proceedings under Rule 111. He shall file with the clerk the original of every such memorandum or order, and 1 additional copy for each party for service by the clerk. The pretrial memorandum or order may be modified upon motion filed by a party within 10 days (or such other time as may be fixed by the commissioner) after service. Subject to such modification, the memorandum or order shall become part of the record and shall govern future proceedings in the action.

RULE 114. COMPLIANCE AND NONCOMPLIANCE

(a) Pretrial Rules Liberally Construed: Each of the foregoing rules relating to pretrial procedure (Rules 111–13) shall be construed liberally to expedite the trial of cases without depriving any party of any just claim, defense, or objection.

(b) Effect of Noncompliance: Upon the failure or refusal of a party to comply with any order or direction by the commissioner pursuant to the rules relating to pretrial procedure (Rules 111–13), the commissioner may—

(1) order that the facts pertaining to the matter in default shall be taken to be established for the purposes of the action in accordance with the contention of the party submitting documents or requests for admissions;

(2) declare a waiver of challenge of the accuracy of any statement or schedule of items and figures reflecting submissions made pursuant to Rule 111(d) or (e);

(3) refuse to allow the disobedient party to support or oppose designated claims or defenses;

(4) prohibit the disobedient party from introducing in evidence designated documents or items of testimony; or

(5) recommend the dismissal of the action or proceeding, or any part thereof, or the rendition of judgment by default against the disobedient party.

No. 75-1068

In the Supreme Court of the United States

OCTOBER TERM, 1975

LEA ASSOCIATES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this federal income tax case is whether amounts petitioner paid for a competitor's business were properly allocated by the Commissioner of Internal Revenue between the seller's agreement not to compete and the capital assets of the business. It is settled that the purchaser of a going business may deduct the amounts paid to acquire a covenant not to compete from the seller over the life of the covenant. However, amounts paid for business assets including good will are capital expenditures which can only be ratably deducted through depreciation over the useful life of such assets if their useful life can be determined.

1. The undisputed facts are as follows: Prior to 1962, petitioner and Ken M. Davee were competitors in providing market research services to large drug manufacturers. The high cost of the market research services each provided limited their potential clients, and it became apparent that

the number of potential customers for this service was insufficient to support both petitioner's market report, the "National Drug and Therapeutic Index," and Davee's report, "Physicians' Panel." Accordingly, petitioner decided to purchase Davee's competing business in the hope of obtaining all or substantially all of Davee's subscribers (Pet. 6; Pet. App. 3a-4a, 18a-21a).

In 1962, petitioner offered to purchase Davee's "Physicians' Panel" for $350,000 (Pet. App. 22a). The proposed purchase price was acceptable to both parties from the beginning and the negotiations which followed focused on the terms of the sales agreement and the noncompetition agreement, which was to accompany the sale, and allocating the total purchase price between these two elements of the transaction (Pet. App. 22a-24a). The negotiations culminated in two contemporaneously executed agreements, a sales contract and a letter agreement (Pet. App. 24a). Under the sales contract (Pet. App. 36a-43a), petitioner agreed to buy Davee's "Physicians' Panel" for $320,000, payable in installments.[1] In the separate letter agreement (Pet. App. 44a-45a), petitioner agreed to pay $30,000 for a five-year covenant by Davee and his wife not to compete with petitioner.

On its 1962 tax return, petitioner claimed deductions for all amounts it paid Davee under both the sales contract and the letter agreement (Pet. 7). On audit, the Commissioner of Internal Revenue disallowed the deductions for amounts paid under the sales contract and refused to allow any depreciation because the assets petitioner purchased did not have a definite useful life. However, the Commissioner permitted petitioner to amortize the $30,000 allocated to the covenant over its five-year term. The Commissioner also asserted deficiencies against Davee, whose

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[1] Petitioner also agreed to pay an additional $37,500 if Davee promptly accepted the offer, which Davee did (Pet. App. 40a).

refund suit was consolidated with this case (Pet. App. 14a, 31a). In this refund suit brought by petitioner,[2] the Court of Claims upheld the Commissioner's determination that amounts petitioner paid under the sales contract were nondeductible capital expenditures (Pet. App. 1a-33a).

2. When the purchase of a business is accompanied by the seller's execution of a covenant not to compete, it is generally in the buyer's interest to allocate the greatest possible portion of the purchase price to the covenant because such amounts are deductible over the life of the covenant. However, because such amounts are taxable as ordinary income to the seller, it is in the seller's interest to allocate the smallest possible portion of the purchase price to the covenant not to compete. Conversely, it is in the seller's interest to allocate the greatest possible portion of the purchase price to the capital assets of the business since the gain from the sale of such assets is taxable at preferential rates.

Because of the competing tax interests of buyer and seller in such a situation, the courts have generally accepted an allocation of price to which the parties have agreed in arm's-length negotiations. Thus, the courts have held that, absent "strong proof"[3] that the agreed allocation totally lacks economic reality or a showing that the agreement was the product of fraud, mistake, or undue influence,[4] for tax

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[2] Because petitioner's taxable year 1962 was already the subject of a refund suit in the Court of Claims, the government asserted the deficiencies at issue by a counterclaim.

[3] See, *e.g.*, *Commissioner* v. *Danielson*, 378 F.2d 771 (C.A. 3), certiorari denied, 389 U.S. 858; *Dakan* v. *United States*, 492 F.2d 1192 (Ct. Cl.).

[4] See, *e.g.*, *Ullman* v. *Commissioner*, 264 F.2d 305, 308 (C.A. 2); *Montesi* v. *Commissioner*, 340 F.2d 97 (C.A. 6); *Barran* v. *Commissioner*, 334 F.2d 58 (C.A. 5).

purposes the parties are bound by the terms of their agreement.

The Court of Claims below properly applied this well-established rule to the facts of this case. Here, petitioner and Davee engaged in arm's-length negotigations with respect to the allocation of the total price of $350,000 between the business assets and Davee's covenant not to compete (Pet. App. 3a-4a, 22a-24a). These negotiations resulted in two agreements—a sales agreement under which petitioner agreed to pay $320,000 for the business and a separate letter agreement calling for the payment of $30,000 for the five-year covenant not to compete.

The Court of Claims correctly accepted the allocation reflected in these arm's length, freely-executed agreements, as the best evidence of the parties' intent. Moreover, the court had the benefit of the evidence offered by both parties (petitioner and Davee) in support of their respective positions, since both parties participated in this consolidated proceeding. Since the evidence showed that petitioner entered into the agreements with a full awareness of the legal and tax consequences that attached to the price allocations and not as the result of any fraud, mistake or undue influence, the court correctly held petitioner to the terms of its bargain.[5]

In renewing its argument made below (Pet. App. 11a) that the entire purchase price paid for the business should be allocated to the agreement not to compete, petitioner relies (Pet. 6) on Section 4 of the sales agreement (Pet. App. 37a-38a), in which Davee agreed not to solicit

[5] Contrary to petitioner's assertion (Pet. 9), there is no conflict with *Williams* v. *McGowan*, 152 F.2d 570 (C.A. 2), or *Watson* v. *Commissioner*, 345 U.S. 544. Those cases hold that a purchase price should be apportioned among the assets and rights acquired, which is exactly what the court below did.

reports or data from physicians. However, as the Court of Claims correctly noted (Pet. App. 12a-13a), the limited restrictions contained in Section 4 of the sales agreement, standing alone, would not have been sufficient to prevent Davee from competing with petitioner through the use of an agent. Thus, the broader restrictions against competition contained in the letter agreement were the source of petitioner's protection against future competition from Davee.

At all events, the fact that the parties agreed to execute a separate covenant not to compete and allocate $30,000 of the purchase price to it demonstrates that the covenant had independent significance to them. Thus, the history of the parties' negotiations shows that, pursuant to Davee's counter offer (Pet. App. 6a), the separate letter agreement was intended to be the operative contract not to compete. Under Davee's counteroffer, $30,000 of the proposed $350,000 sales price was to be allocated to the covenant (see Pet. App. 6a). On these facts, the Court of Claims correctly concluded that the letter agreement calling for the $30,000 payment for what is referred to in the evidence of the negotiations (Pet. App. 24a) as Davee's promise "guaranteeing non-competition," represented the parties' allocation of a portion of the purchase price to the covenant not to compete. As the court observed (Pet. App. 11a), petitioner's allocation of the total purchase price to the covenant not to compete is extreme and would necessarily constitute an unwarranted revision of the parties' agreements.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.